Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-98-1

FACTS:

You are a registered professional engineer who serves as the Chairman of the Fire Safety Commission ("Commission"), a position appointed by the Governor.

The Commission was established pursuant to G. L. c. 6, §200 and consists of the state fire marshal or his designee, the chairman of the board of building regulations and standards or his designee, the fire commissioner of the City of Boston or his designee and six members appointed by the Governor. Of the six members appointed by the Governor: one shall be a member of the Fire Chiefs Association of Massachusetts; one shall be a member of the Massachusetts Association of Realtors; one shall be a member of the hotel and motel association; one shall be a registered professional engineer who is also a structural engineer; one shall be an inspector of wires with ten years experience; and one shall be a member of the sprinkler fitters union. Commission members who are not otherwise employees of the Commonwealth receive a stipend and necessary travel expenses incurred in the performance of their duties.

The duties of the Commission are periodically to meet "to alter, rescind, amend and repeal . . . rules and regulations providing for the implementation of a statewide plan to require the installation of automatic sprinklers in all buildings or structures subject to the provisions of section twenty-six A½ of chapter one hundred and forty-eight."[1/] Any amendments, repeals, or new rules and regulations proposed by the Commission must be submitted to the General Court and referred to the appropriate joint Legislative standing committee. The Legislative committee is required, within thirty days, to hold a hearing and make a report to the Commission. After review of the report, the Fire Safety Commission may adopt final regulations. According to G.L. c. 6, §200, "[n]o member shall act as a member of the commission or vote in connection with any matter as to which his private right, distinct from public interest, is concerned."

According to the Commission's regulations, 530 CMR §§ 2.00 et. seq., upon the filing of the Commission's regulations with the Secretary of State, the head of the fire department in each municipality must serve notice on building owners indicating that the building is within the scope of the regulations. Any owner of a building or structure constructed prior to January 1, 1975 that exceeds seventy feet in height above mean grade must submit to the head of the fire department of his city or
town a statement of intent, schedule, and fire protection systems data sheet for the installation of an automatic sprinkler system in compliance with G.L. c. 148, §26A½. A copy of this information also is filed with the Commission.[2/]

Under G.L. c. 148, §26A½ and the implementing regulations, the head of the municipal fire department shall enforce and administer the provisions of the statute and the regulations.[3/] 530 CMR §2.01(5). Prior to installation of a sprinkler system, an application for a permit is submitted to the local building official who forwards a copy to the head of the local fire department. 530 CMR §2.01(6). The permit application must contain specifications and plans certified by a Massachusetts professional engineer. 530 CMR §2.01(7). No work may begin on

the sprinkler system until a permit is issued by the building official, with the approval of the fire department. 530 CMR §2.01(8).

In addition to the Commission duties outlined in G.L. c. 6, §200, the Commission, pursuant to G.L. c. 6, §201, also serves as the Automatic Sprinkler Appeals Board (Appeals Board). The Appeals Board hears appeals from local fire officials' determinations made in accordance with G.L. c. 148, §26A½ and §26G[4]. The Appeals Board has the power to reverse, affirm, or mod-ify a local fire official's determination, order or requirement. Also, the Appeals Board may grant a variance from any provision of G.L. c. 148, §26A ½ or from any provision of the rules and regulations promulgated by the Commission; "may determine the suitability of alternate materials and methods of sprinkler installation"; and may provide reasonable interpretation of its rules and regulations and of c. 148, §26A½ .

Finally, the Appeals Board may grant a waiver or an extension of time for compliance with G.L. c. 148,§ 26A½. You indicate that, in practice, waivers are rarely given. Most of the cases before the Board involve variance requests, time extension requests, and the review of alternative methods. You indicate that the parties before the Appeals Board are the property owner and the local fire official.

Under G.L. c. 6, §201, the Chairman of the Commission may designate five members of the Commission to sit as the Appeals Board in order to hold a public hearing. The chairman also schedules the time and place for the hearing. At that hearing, the selected members hear testimony under oath and take evidence. The Appeals Board issues a written decision and findings, which is appealable to the Superior Court under G.L. c. 30A. In any c. 30A appeal, the Appeals Board is named as a party and is represented by the Attorney General.

You state that the Appeals Board may meet once a month, but the full Commission meets only once a year. You state that the combined duties of the Commission and the Appeals Board require less than 800 hours per year.

In addition to your responsibilities on the Commission/Appeals Board, you own a sole proprietorship business that engages in fire protection engineering and consulting services. You design and engineer fire protection and life safety systems, including sprinkler systems, standpipes and fire pumps, fire alarm and signaling systems; provide code consulting and hazard evaluation; design protection alternatives and approaches; and perform life safety system evaluations. (Technical Services) You provide Technical Services in the commercial, residential and industrial markets and your clients include owners, property managers, architects, engineers, government agencies and contractors.

You indicate that your work is very technical and specific to each particular project, but you also provide educational and procedural information to your clients regarding compliance with building codes and regulations and appeal options. For example, if a client requires an alternative design, your services would include not only the original design and engineering of the system, but also your services as a technical advisor throughout any likely appeal process. You may prepare the forms to be submitted on appeal to the Appeals Board and, as the owner's technical advisor, provide testimony under oath to the Appeals Board. All of these services would be included in your engineering fee, which is paid by the client on a fixed cost or hourly basis. You have never been hired solely to represent a client on appeal.

Initially, any work you perform for a client would be submitted to the local building and fire officials and an appeal may or may not follow. If there is an appeal, your reports would become part of the record on appeal.

QUESTIONS:

1. May you, in your private engineering and consulting practice, receive compensation from a client to provide Technical Services in connection with an Appeals Board proceeding and/or to assist or represent the client in the appeals process before the Appeals Board?

2. May you, in your private engineering and consulting practice, receive compensation from a client to testify under oath on behalf of the client before the Appeals Board?

3. Does your private engineering and consulting practice limit your participation on the Commission/Appeals Board?

ANSWERS:

1. G.L. c. 268A, §4 prohibits you from receiving compensation from a client if you know or reasonably should know that the Technical Services will require you to prepare reports or other submissions to the Appeals Board or likely will result in Appeals Board proceedings.

2. G.L. c. 268A, §4 prohibits you from receiving compensation from a client to provide testimony before the Appeals Board.

3. G.L. c. 268A, §§6 and 23 place restrictions on your participation as a Commission/Appeals Board member.

DISCUSSION:

SECTION 4

Provision of Technical Services

For purposes of the conflict of interest statute, you are a state employee.[5/] As you serve less than 800 hours per year, you are considered to be a special state employee.[6/] As such an employee, you are subject to G.L. c. 268A, §4.

G.L. c. 268A, §4(a) provides that "no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." Further, G.L. c. 268A, §4(c) provides that "no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." Section 4 applies to special state employees only in connection with matters in which they have participated or over which they have official responsibility as a state employee, or, if the employee serves for more than sixty days, matters which are pending in the employee's agency.

Section 4 is based on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, *The New Federal Conflict Law*, 76 Harv. L. Rev. 1113, 1120 (l963). In discussing §17(a), the municipal counterpart to §4(a), we have stated:

> *[The section] seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence--by action or inaction--official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest. EC-COI-92-36. See also, Commonwealth v. Newman, 32 Mass. App. Ct. 148, 150 (1992); Commonwealth v. Canon, 373 Mass. 494, 504 (1977).*

Further, §4(a) applies irrespective of whether the interests of the non-state party and the Commonwealth are adverse. As recognized by the Supreme Judicial Court, " [t]he Legislature's objective [in enacting §4] 'was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.' It can not fairly be said that unless public and private interests in a particular matter are adverse, there can be no appearance of conflict, nor can it properly be said that the Legislature has no legitimate interest in preventing such an appearance." *Edgartown v. State Ethics Commission*, 391 Mass. 82, 88 (1984) (citations omitted).

Proceedings before the Appeals Board and submissions to the Appeals Board are particular matters[7/] in which you participate[8/] or over which you have official responsibility[9/] as a Commission/Board member. Fur-ther, we conclude that proceedings before the Appeals Board are of direct and substantial interest to the Commonwealth. The Appeals Board is empowered to grant exemptions and waivers from the requirements in the General Laws. Having established specific requirements regulating automatic sprinklers, the Commonwealth has a direct and substantial interest in any proposal to alter these requirements. *See Attorney General Conflict Opinion No.* 172, October 8, 1963 (Commonwealth has direct and substantial interest in rules and regulations pertaining to administration of insurance laws); *Compare EC-COI-97-2* (state board in essence resolves a private dispute and is not a party to an appeal of its decision). It is noteworthy that the Appeals Board is a party to any appeal of its decisions and thus, has a stake in its decision. *See EC-COI-97-2* (Commonwealth's interests in benefit's claim made by private party against private insurer before Industrial Accidents Board not sufficiently direct and substantial where Commonwealth's role is to provide an impartial forum and Commonwealth is not a party and does not have a stake in the Board's determination whether or not to award benefits).

On the other hand, we conclude that the Commonwealth does not have a direct and substantial interest in a permit determination by the local fire official that a fire system design or timetable complies with the statutory scheme under G.L. c. 148 and local bylaws and ordinances, if the local determination is not appealed to the Appeals Board. *See e.g., EC-COI-83-103* (member of state appeals board may be involved in projects for private clients as project is not under official responsibility until a lower board acts). Under c. 148, §26A½ , the Legislature provided that the initial opinion or determination is to be made by the local fire official and that the fire official, not the Appeals Board, has the power to enforce the provisions of this section. *See EC-COI-92-22; 86-2.* Any interest of the Commonwealth in the possibility of an appeal of the local decision to the Appeals Board at some future time is not sufficiently direct and substantial to implicate §4. *EC-COI-80-94* (interest of Common-wealth in civil suit between

private parties because of possibility of criminal prosecution in future arising from same events not direct and substantial). Under G.L. c. 6, §201, the Board has no authority to intervene in the local decision-making process, unless and until an aggrieved party petitions the Board. Further, although the Appeals Board reviews the local determination, it is not required to defer to the local authority. The Appeals Board is empowered to hold hearings, hear testimony, take evidence and issues findings and a decision "reversing, affirming or modifying in whole or in part" the local determination. G.L. c. 6, §201. As we stated in *EC-COI-97-2*, "[b]y using the modifying phrase 'direct and substantial,' the Legislature intended that the commonwealth's interest in the proceedings or the outcome be significant and direct to the commonwealth itself as an institution." *See EC-COI-93-5* (regulatory authority and oversight of activity alone not sufficient to find particular matter in which Commonwealth has direct and substantial interest); 83-120; 83-67; *Burton v. United States*, 202 U.S. 344, 391-396 (1906) (direct interest of government must be more than government's interest as "parens patriae" or interest government shares with all citizens).

Thus, we conclude that, under §4, you may not receive compensation from or provide Technical Services to a client in an Appeals Board proceeding. You may not receive compensation from a client to prepare or file submissions to the Appeals Board or to prepare the client's case and strategies to use before the Appeals Board.

You may not provide Technical Services if you know or reasonably should know that you will be required to prepare reports or other submissions to the Appeals Board, or if you know or reasonably should know that your client's project will become the subject of Appeals Board proceedings. The Ethics Commission, in *In re Hewitson, 1997 SEC 874,* recently advised professionals that "[w]here a public official is privately employed as a professional, such as a botanist, engineer, or surveyor, and is asked as such a professional to prepare a report which he knows or reasonably should know is likely to be submitted to a board, agency or commission in his own town, the public official has a duty to inquire as to whether the report will be so submitted. If the answer to the inquiry is yes . . . the public official will generally be barred by §17 [the municipal counterpart to §4] from accepting the job." Thus, at the time that you are approached by a client, you have a duty to inquire whether your proposed work is reasonably likely to involve particular matters before the Appeals Board.

On the other hand, if, at the time you agree to do work for a client, you make the above-described inquiry and do not reasonably believe that the work will involve particular matters before the Appeals Board, but rather, will end with a local permit determination, then you may undertake the consulting work because the Commonwealth does not have a sufficiently direct and substantial interest. *See e.g., EC-COI-92-22*; *86-2; 83-103.* If your client does appeal to the Appeals Board, you must cease providing Technical Services because, at the time of the appeal, the interest of the Commonwealth will be sufficiently direct and substantial.

Service As Expert Witness

You have stated that your fee for services includes technical support and, if required, your services as an expert technical witness if your client appeals to the Appeals Board. Under a literal reading of G.L. c. 268A, §4(a), your compensation for services as an expert witness before the Appeals Board is prohibited, unless some other paragraph in §4 limits the application of that section to state employees who become expert witnesses. As we concluded above, proceedings before the Appeals Board are of direct and substantial interest to the Commonwealth. Further, these proceedings are within your official responsibility, even if you do not personally participate in the hearing as a Board member. *EC-COI-90-11; 89-7*. Finally, any

compensation you receive for your services as an expert witness is in connection with the Appeals Board proceeding.

The third to the last paragraph of §4 of G.L. c. 268A states:

> *This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.*

Whether this paragraph will permit you, notwithstanding the general prohibition in §4(a), to receive compensation from a client to testify under oath as an expert witness is a question of first impression for the Ethics Commission.[10/] We, in prior opinions, have indicated that this paragraph would permit state employees to testify on an uncompensated basis in proceedings in which the Commonwealth is a party or has a direct and substantial interest. *See EC-COI-83-103; 83-69* (consultant to Attorney General's Office, who was a special state employee, permitted to testify, on uncompensated basis, as expert witness, on behalf of private party in a court proceeding in which Attorney General's Office represented by special counsel); *83-45 (*Department of Mental Health employee testified about her official report on behalf of non-state party in proceeding in which different state agency was a party)*; 80-94* (state employee could testify in arson prosecution on uncompensated basis about her private laboratory work). In each of these opinions, the Ethics Commission expressly reserved the question concerning witness compensation, stating, "[i]f you were to be compensated for your activities as an expert witness, the analysis under §4 might be different." *EC-COI-83-69*.

For the following reasons, we conclude that the "witness exemption" paragraph will not permit you to receive compensation for testifying as an expert witness. A review of the plain language of the witness exemption does not answer the compensation question because this statutory paragraph is silent concerning any compensation provision for witnesses.

When interpreting statutory language, we follow the principle that:

> The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.

Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984) (citations omitted). Viewing §4 in its entirety, unlike the witness exemption, each of the other seven paragraphs in § 4 which limit the application of the main prohibitions in §4(a) and §4(c) mentions compensation. Mindful of the canon of statutory construction that, "when the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present", we decline to infer a compensation provision for expert witnesses. *Commonwealth v. Galvin*, 388 Mass. 326, 330 (1983); *see also, Leary v. Contributory Retirement Appeal Board,* 421 Mass. 344, 348 (1995); *Tesson v. Commissioner of Transitional Assistance*, 41 Mass. App. Ct. 479, 482 (1996).

Section 4 contains two distinct prohibitions. Section 4(a) prohibits the receipt of compensation. For purposes of the conflict of interest law, "compensation" is defined as " any money, thing of value or economic bene-fit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G.L. c. 268A, §1(a). Thus, under §4(a), a state employee may not, otherwise than as required by law for the proper discharge of

official duty, receive any economic benefit from a non-state party for any services rendered in a particular matter in which the Commonwealth is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from acting in a representational capacity as an agent or attorney in connection with any particular matter in which the Commonwealth is a party or has a direct and substantial interest. By his conduct, a state employee may violate either or simultaneously both of these sections. Buss, *The Massachusetts Conflict Of Interest Statute: An Analysis*, 45 B.U. L. Rev. 295, 324 (1965).

Section 4 and the witness exemption were enacted as part of the original 1962 conflict of interest legislation, c. 779 of the Acts of 1962. The language of the witness exemption has remained unchanged since 1962. In the original bill, H. 3650, the prohibitions against receiving compensation and acting as an agent were embodied in two separate sections, §4 (prohibiting compensation) and §5 (activities of agent or attorney). Yet another section, §8, established the "application of sections four and five to personnel administration proceedings, assistance by member of immediate family or personal fiduciary, necessary assistance to contractors and testimony." Section 8(d) stated "nothing in section 5 prevents a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt." The other paragraphs in §8 dealing with further exemptions to the main prohibitions, delineated whether each paragraph applied to §4 and/or §5 and also contained specific language regarding whether compensation was permitted.[11/] Thus, in the original bill, the testimony exemption was intended only to limit the applicability of the prohibition against acting as an agent or attorney. No similar allowance was made for the compensation of witnesses.

H. 3807 was substituted for H. 3650 and contained revisions to H. 3650. In H. 3807, the original sections 4, 5 and 8 were consolidated into separate paragraphs of §4, replacing the language indicating whether the exemption applied to §4 and/or §5 with "this section." The language in the other exemptions relating to compensation remained unchanged. Although it is not completely free from doubt, there is no indication that the Legislature, in consolidating the original §§4, 5 and 8 and in making the necessary editorial changes for internal consistency, intended to deviate from its original intent that the witness exemption applied only to the prohibition against acting as an agent or attorney.

Our opinion that the witness exemption is intended only as an exemption to the §4(c) restrictions and not to the §4(a) restrictions is further supported by the analogous federal conflict of interest statute. The Legislature, in promulgating c. 268A, sought guidance from and adopted portions of the federal conflict of inter-est statute. *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962, at 8 (as to format and pattern of proposed conflict legislation used bill HR 8140 pending in the Congress; much of language of proposed conflict law taken and adopted from federal bill). The analogous federal counterparts to G.L. c. 268A are 18 U.S.C. §203(a), which prohibits compensation for any representational service as an agent or attorney or otherwise in relation to any particular matter in which the United States is a party or has a direct and substantial interest and 18 U.S.C. §205(a), which prohibits acting as agent or attorney for prosecuting any claim against the United States or from acting as agent or attorney before any department, agency, court, etc. in which the United States is a party or has a direct and substantial interest.

Title 18 U.S.C. §205(g) limits the application of 18 U.S.C. 205(a) (regarding acting as agent or attorney) and contains almost verbatim language to the witness exemption in G.L. c. 268A, §4. Title 18 U.S.C. §205(g) was part of the 1962 federal statutory scheme. Title 18 U.S.C. §203(a), concerning receipt of compensation, did not contain a comparable witness testimony exemption until the Congress added one in 1990. Pub. L. 101-280 §5(b)(5) (Ethics

Reform Act of 1989). Thus, at the time of the 1962 enactment of G.L. c. 268A, the federal statute contained almost verbatim language regarding an exemption for witness testimony and the federal exemption served only as a limitation on the agency provisions of 18 U.S.C. §205(a).[12/]

It appears that the Massachusetts Legislature chose to create a narrow exemption, adopted from the federal statute, recognizing the need to clarify that, as a practical matter, when a state employee is called by a non-state party to testify in a proceeding in which the Commonwealth is a party or has a direct and substantial interest, his actions will not be considered representational acts of agency. However, given the prophylactic purpose of § 4, to prevent even the appearance of conflicting loyalties between the public and private interest, the Legislature may not have been inclined to extend the exemption to include the receipt of an economic benefit for one's testimony in a proceeding in which the Commonwealth is a party or has a direct and substantial interest.

In conclusion, if the Legislature had intended to permit state employees to be compensated by someone other than the Commonwealth as expert witnesses in matters in which the Commonwealth or a state agency is a party or has a direct and substantial interest, it could have done so explicitly. *See e.g., Bartlett v. Greyhound Real Estate Finance Co.,* 41 Mass. App. Ct. 282, 287*(*1996). Consistent with the overall purpose of G.L. c. 268A, §4, we interpret the witness exemption narrowly and decline to infer that said exemption permits your compensation by someone other than the Commonwealth for your testimony in a Board proceeding.[13/] *See e.g., Baker Transport, Inc. v. State Tax Commission*, 371 Mass. 872, 877 (1977) ("exception to the general rule to be narrowly construed"); *Galvin,* 388 Mass. At 330 ("where statute appears not to provide for an eventuality, no justification for judicial legislation"); *Tesson*, 41 Mass. App. at 482 ("language of statute not to be enlarged or limited by construction unless its object and plain meaning require it").[14/]

SECTION 6

Your opinion request also raises issues under G.L. c. 268A, §6, which governs a state employee's participation in matters in which he has a financial interest. Section 6 provides, in relevant part, that a state employee may not participate in a matter in which he, an immediate family member, a partner, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest. In prior precedent interpreting §6, we have advised a state employee that he may not participate in giving a state-mandated examination to an individual who was a student of his spouse whom the student compensated in exchange for preparing him for the examination, stating "[the spouse's] reputation as an instructor and the ultimate financial success of the . . . school which she will own is affected by the success rate of her students . . . ." *EC-COI-82-105; see also, 96-2, n.10; 82-176* (same).

Applying this precedent to your situation, we conclude that you have a financial interest in an Appeals Board review of any work which you have provided for a client and for which you have received compensation because the success of your business and your professional reputation depend upon the quality and integrity of your work.[15/] For example, if the Appeals Board declines to accept or rely upon drawings or plans that you have designed, finding such drawings/plans inadequate, incomplete, or erroneous, this action may affect your reputation with the specific client whose appeal is pending, as well as the reputation of your business in general.

Accordingly, under G.L. c. 268A, §6, you must abstain, as a Commission/Appeals Board member, from participating in any Appeals Board proceeding in which your professional work will be reviewed by the Board, unless you receive an exemption from your appointing authority, the Governor, as described below. Further, you must abstain from participating as Chairman of the Commission in the selection of the Appeals Board panel that will hear an appeal involving your work, and you may not delegate the task of selecting the panel to another member of the Commission/Appeals Board. All of these actions constitute participation in a matter in which you have a reasonably foreseeable financial interest. *See e.g., EC-COI-92-33; 86-13*.

Under §6, if your Commission/Appeals Board duties would otherwise require you to participate in a matter reviewing your professional engineering work, in addition to abstaining from the matter, you must also fully disclose to the Governor, who is your appointing authority, and the State Ethics Commission, in writing, all relevant facts about the conflict of interest, including the facts surrounding your professional relationship with the Appeals Board appellant and the use of your work product. Upon receiving said disclosure, the Governor should delegate the particular matter to another Commission/Appeals Board member, assume responsibility himself, or make a written determination that you may participate because your interest is not so substantial as to affect the integrity of your services to the Common-wealth. Copies of this written determination by the appointing authority should be forwarded to you and to this Commission. If you do not receive a prior written determination from the Governor that you may participate in a particular matter, you will be required by §6 to continue abstaining from participation in the particular matter.

SECTION 23

G.L. c. 268A, §23 contains standards of conduct which are applicable to all state, county and municipal employees. Section 23(b)(2) provides, in pertinent part, that no public employee may use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. Under §23(b)(2), the Commission has consistently prohibited state employees from using their titles, public time and public resources to promote a private interest. *See, e.g., EC-COI-92-28; 92-12; 92-5* (legislator may not use state seal on correspondence to promote political campaign); *Public Enforcement Letter 89-4* (state employee may not use state letterhead, state time, state secretarial resources to promote private trip). Under this section, you may not use state resources or state time to promote your private business.

G.L. c. 268A, §23(b)(3) prohibits a municipal employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. For example, issues may be raised under this section if a matter involving a former client comes before the Commission/Appeals Board but you have not provided any Technical Services in connection with said matter before the Board so you are not required to abstain under §6. Nevertheless, this relationship creates an appearance of a conflict of interest or bias in one's official actions as a result of one's private interests. *EC-COI-92-40; 91-3; 89-19; 89-16*. In order to dispel the appearance of a conflict, §23(b)(3) requires that you file a written disclosure of the relevant facts, prior to participation as a Commission/Appeals board member, with the Governor, as your appointing authority. This disclosure is a public record.

If you participate in a matter affecting a former client, you should take care under §23(b)(2) and §23(b)(3) to base any decisions affecting the former client on the merits, using

objective standards and following all requisite procedures. If you are unable to judge the matter impartially, you should abstain. *See EC-COI-95-4*.

DATE AUTHORIZED: February 10, 1998

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1/]G.L. c. 148, §26A½, in pertinent part, requires every building and structure of more than seventy feet above the mean grade, constructed prior to January 1, 1975, to be protected with an adequate system of automatic sprinklers. The statute provides a schedule for compliance, but allows the owner to seek a waiver or extension to the statutory schedule.

[2/]The regulations also provide a choice of schedules for implementation of G.L. c. 148, §26A½, allowing for statutory compliance between 1991 and 1997. 530 CMR §2.03(3). At the end of each calendar year, the building owner is required to submit a progress report to the local fire official and to the Commission, summarizing progress under the chosen schedule. 530 CMR §2.03(4). The head of the fire department or persons authorized by the head of the fire department have the right to inspect any building or structure for compliance with 530 CMR §2.00 and G.L. c . 148, §26A½. 530 CMR §2.03(5).

[3/]Under §26A½,

> The head of the fire department shall enforce the provisions of this section. Whoever is aggrieved by the head of the fire department's interpretation, order, requirement, direction or failure to act under the provisions of this section, may, within forty-five days after service of notice thereof, appeal from such interpretation, order, requirement, direction, or failure to act, to the board of appeals. . . .

[4/]In any city or town which accepts its provisions, G.L. c. 148, §26G generally requires every building of more than seventy-five hundred gross square feet and every addition of more than seventy-five hundred gross square feet to be adequately protected by an automatic sprinkler system. Similar to G.L. c. 148, §26A½, under §26G, the head of the fire department is the enforcement officer and aggrieved parties may appeal to the Appeals Board.

[5/]"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council . . . G.L. c. 268A, §1(q).

[6/]"Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

[7/]"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

8/"Participate," participate in any action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

9/"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

10/The Ethics Commission has, in its precedent, applied this exemption to special, as well as to "regular"state employees. To do otherwise would create the anomalous result that a full- time state employee would be permitted, if requested by a private party, to testify under oath, on an uncompensated basis, before his agency, but a special state employee, under the special state employee restrictions in §4, would be prohibited from so testifying. *See e.g., Neff v. Commissioner of the Dep't of Industrial Accidents*, 421 Mass. 70, 75-76 (1995) (legislation not to be interpreted contrary to legislative intent). In enacting G.L. c. 268A, the Legislature intended that §4 apply less restrictively, not more restrictively, to special state employees. *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962 at 12-13. ("imposing broad disabilities on special employees would render it impossible for the Commonwealth to have the service of specialists or other capable people for specific assignments in departments or agencies").

11/For example, §8(b) states "nothing in section 4 or 5 prevents a state employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility provided that the state official responsible for appointment to his position approves."

12/The federal Office of Government Ethics, in interpreting the federal witness exemption, has promulgated a regulation stating:

> an employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency. . . .

5 CFR §2635.805. Prior to authorizing service as an expert witness, the agency ethics official must determine, after consultation with the agency representing the government or having the most substantial interest in the matter, that service as an expert is in the government's interest and that the subject matter of the testimony does not relate to the employee's official duties. 5 CFR §2635.805(c). Finally, the regulation prohibits a special government employee (similar to a special state employee) from serving, "other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized" as described in 5 CFR §2635.805(c).
5 CFR §2635.805(a)(2).

13/We note that G.L. c. 268A, §3 prohibits the offer or receipt of anything of substantial value to any person "for or because of testimony under oath or affirmation given or to be given by such person or any other person as a witness upon a trial, hearing or other proceeding, before any court, any committee or either house or both houses of the general court, or any agency, commission or officer authorized by the laws of the commonwealth to hear evidence or take testimony or for or because of his absence therefrom. . . . " The last paragraph of §3 states that these cited paragraphs "shall not be construed to prohibit the payment or receipt of witness fees provided by law or the payment by the party upon whose behalf a witness is called and receipt by a witness of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, in appearing or testifying." The purpose of §3, which, in part, prohibits the receipt of a gratuity for testimony or for a refusal to testify is fundamentally different from the purposes underlying §4, as discussed above. We do not read the last paragraph of §3 as permitting an expert witness fee otherwise prohibited by §4 because said fee would be in connection with a matter in which the Commonwealth is a party or has a direct and substantial interest.

14/In this opinion, we do not address the issue of whether a state employee who serves as a witness in a proceeding in which the Commonwealth is a party or has a direct and substantial interest may receive a statutory witness fee from someone other than the Commonwealth. *See e.g.,* G.L. c. 262, §29.

[15]/This situation would arise if some work that you performed on the municipal level resulted in an Appeals Board proceeding but, at the time that you undertook the work, you did not know nor did you have reason to know that your work would become part of an appeal to the Appeals Board.